

# MINUTES

## WARRICK COUNTY AREA BOARD OF ZONING APPEALS

Regular meeting held in Commissioners Meeting Room,  
Third Floor, Court House,  
Boonville, IN  
Monday, October 25, 2010, 6:00 P.M.

**MEMBERS PRESENT:** Larry Willis, Chairman; Mike Winge, Vice Chairman; Tina Baxter, Tony Curtis, Don Mottley, and Terry Dayvolt.

Also present were: Sherri Rector, Executive Director and Secretary; Morrie Doll, Attorney; and Susan Hilgeman, staff.

**MEMBERS ABSENT:** Judy Writsel.

The meeting was called to order by the Chairman. Roll call was taken and a quorum was declared present.

**MINUTES:** Upon a motion made by Don Mottley, and seconded by Mike Winge, the minutes of the last regular meeting held September 27, 2010, were approved as circulated with Larry Willis abstaining.

The Chairman explained the Rules of Procedure to the audience.

### **VARIANCE:**

**BZA-V-10-26** – Applicant & Owner: Milestone Properties, LLC by Ray Yeager, Construction Manager and Pat Hammer, Owner

**PREMISES:** Property located on the N side of Roslin Rd. approximately 75' NW of the intersection formed by Roslin Rd. and Wethers Rd. (W 450), Boon Twp. Lot 13 Roslin Industrial Park. *4488 Roslin Rd.*

**NATURE OF CASE:** Applicant requests a Variance from the requirements as set forth in the Comprehensive Zoning Ordinance in effect for Warrick County, IN to allow an Improvement Location Permit to be issued for the construction of 2 monument signs located within a 60' building setback line in a recorded subdivision in an "M-2" General Industrial Zoning District.

Present was Ray Yeager, Construction Manager.

Mrs. Rector asked if he had a power of attorney to represent Pat Hammer.

Mr. Yeager stated he did.

Attorney Doll took the Power of Attorney for review.

The Chairman called for a staff report while the Attorney was reviewing the Power of Attorney.

Mrs. Rector stated all return receipts for certified mail have been submitted except from John Guidry. She stated they did lose the white pay stub, but they do have a print out from the internet and a copy of the receipt from when they mailed them. She stated the location is on the North side of Roslin Road at 75' Northwest of Wethers Road and Roslin Road on lot 13 of Roslin Industrial Park. She stated the recovery center is located on lot 14, so the permit will be given on lots 13 and 14 because the entrance is on 13. She stated the request is for a variance to allow the construction of 2 monument signs located in the recorded 60' building setback line in a recorded

subdivision. She stated the signage is required to be at least 5' off any property line. She stated the purposed sign is going to be located 0' off the property line. She then stated the applicant states on the application, "It is to allow construction of two monument signs along the radius on both sides of the entrance to Brentwood Meadows on Milestone Properties LLC. The signs will be located between Roslin Road and the 60' building setback line. If the signs were placed back behind the setback, it would not be adequately visible." She then stated they have a letter from the County Engineer, Bobby Howard, stating, "The proposed signage at 4488 Roslin Road does not appear to block the sight distance at the location shown on the plans filed with the verified application for variance from the requirements of the zoning ordinance." She stated the surrounding property is all zoned "A" Agriculture and "M-2" General Industrial and this is in an industrial park and there are several warehouses on the lots within the subdivision. She stated there is no flood plain and the access is off Roslin Road. She stated the application is in order.

The Chairman asked if the applicant had anything further to add to the staff report.

Mr. Yeager stated no, not at this time. He stated the main reason for this necessity of having the visibility for the 24 hour hospital, that is the main reason.

The Chairman asked Attorney Doll if the Power of Attorney was in order.

Attorney Doll stated the Power of Attorney is perfect except Milestone Properties is a Limited Liability Company and it does not denote that, it just calls it Milestone Properties, but he thinks that is close enough.

Mrs. Rector stated as the Board can tell by the plot plan the property is located on a curve as you come around so it would not cause a problem with sight distance.

Mr. Dayvolt asked how big are the signs.

Mr. Yeager stated the dimensions are on the drawing, but he believes 6' tall and 14.5' long.

Mr. Mottley stated 15'8" wide and 6' tall. He then stated on this one drawing he is looking at it says 30' drainage easement.

Mrs. Rector stated the signs are not in it. She stated it is from the dotted line east to the property line.

Mr. Mottley stated okay.

Mrs. Rector asked if they would set the signs back behind the setback line then the signs would not be visible from the curve.

Mr. Yeager stated it would be practically obscured but they just basically want a little better visibility for patients trying to access the hospital.

Mr. Willis stated he agrees they would not be able to see the signs, it would have to be elevated and he would rather see these monument signs, he thinks they are more curb appealing.

There being no remonstrators and no further questions by the Board, the Chairman called for a motion.

Don Mottley made a motion to approve the Variance Application based upon and including the following findings of fact:

1. The grant of the Variance will not be injurious to the public health, safety, morals, and general welfare of the Community. As such, it is further found that the granting of the Variance shall not be materially detrimental to the public welfare.
2. The use or value of the area adjacent to the property included in the Variance will not be affected in a substantially adverse manner. As such, it is further found that the granting of the Variance shall not result in substantial detriment to adjacent property or the surrounding neighborhood.
3. The need for the Variance arises from some condition peculiar to the property involved. The peculiar condition constituting a hardship is unique to the property involved or so limited to such a small number of properties that it constitutes a marked exception to the property in the neighborhood. Such condition is the shape and location of the site and the need for the public to identify the medical facility.
4. The strict application of the terms of the Warrick County Comprehensive Zoning Ordinance will constitute a practical difficulty, unusual and unnecessary hardship if applied to the property for which the Variance is sought.
5. The approval does not interfere substantially with the Warrick County Comprehensive Zoning Ordinance adopted pursuant to IC 36-7-4-500 et seq.
6. The granting of the Variance is necessary in order to preserve a substantial property right of the petitioner to use the property in a reasonable manner, and not merely to allow the petitioner some opportunity to use his property in a more profitable way or to sell it at a greater profit.
7. That the hardship to the applicant's use of the property was not self-created by any person having an interest in the property nor is the result of mere disregard for or ignorance of the provisions of the Warrick County Comprehensive Zoning Ordinance.
8. The approval of the requested Variance is the least modification of applicable regulations possible so that the substantial intent and purpose of those regulations contained in the Warrick County Comprehensive Zoning Ordinance shall be preserved.
9. This Variance shall expire six (6) months after this date, UNLESS a Permit based upon and incorporating this Variance is obtained within the aforesaid six (6) month period or unless the provision of the Variance are adhered to within the aforesaid six (6) month period. Upon advance written application for good cause, a renewal for an additional six (6) month period may be granted by the Secretary of the Area Plan Commission.
10. The Variance Application is subject to the terms contained therein and the plans on file subject to the following additional conditions:
  - a) Subject to an Improvement Location Permit being obtained.
  - b) Subject to any required Building Permit from the Warrick County Building Department being obtained.
  - c) Subject to the property being in compliance at all times with the applicable zoning ordinances of Warrick County.
  - d) Subject to all utility easements and facilities in place.

The motion was seconded by Mike Winge and unanimously carried.

**OTHER BUSINESS:**

Larry Willis stated he received an email about attendance on the Area Plan Commission and he thinks this might be a good time to reiterate to the members that being appointed to these boards is very important and they do have an obligation when they accept the appointment that they show up and be here. He stated he know he put them in a precarious situation at the last Area Plan Commission meeting. He stated they had a quorum but because one Board member abstained, there were only three that voted. He stated so the rezoning went without a recommendation to the County Commissioner. He stated everyone has been very good this year at attending these meetings and he appreciates that. He stated it is embarrassing when they have to turn someone away because not enough Board Members show up.

Mrs. Rector stated and these people have spent a lot of time and money to do these applications. She stated they have to look up all their adjacent property owners and mail them the certified letters. She stated that doesn't even include all the work the staff does to get the application in order. She stated which includes typing up the ad to be advertised in the newspaper. She stated all this goes into it and then they get to the meeting and they don't have enough members here to carry a motion, it doesn't look good for the office or the Boards either one.

Mr. Winge asked when did they not have enough for a quorum.

Mrs. Rector stated this Board used to be really bad about it. She stated it was the Area Plan the other night.

Mr. Willis stated the only reason he brings it up is because Sherri sent it out to the Area Plan Commission members and he just wanted to make sure that they rethink the obligation they have taken to serve the community.

Mrs. Rector stated the staff always call the Board members up to remind them. She stated at least call us back if you are not coming. She stated at that meeting someone had said they were going to be here and Larry was not able to drive so they told him not to worry about getting a ride because they thought they had enough members. She stated they did not hear from two of them and then one didn't show up that said they would. She stated if you can come at least call and leave a message on the office phone.

Mr. Willis stated his wife could have brought him up and he could have been here if they would have known. He stated there is a lot of money invested in getting all the applications together and also all the time that the office staff spends on each application which is money again.

Mrs. Rector stated a lot of times on rezonings that goes to the County Commissioners with no recommendation, come back so that is putting those people out and off another 30 days and then another 30 days for it to go back to the Commissioners. She stated sometimes, time is of the essence.

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Mrs. Rector stated don't forget November's meeting will be the 15<sup>th</sup> because of Thanksgiving. She then stated December's would be on December 20<sup>th</sup>.

**ATTORNEY BUSINESS:**

Attorney Dolls stated in the Hamby lawsuit the plaintiffs have asked the court of appeals to reconsider their decision. He stated he doubts that it will change.

**EXECUTIVE DIRECTOR BUSINESS:**

**Amend The BZA Rules of Procedure.**

Mrs. Rector stated they are going to discuss the Rules of Procedure and could vote on it if the Board chooses so. She stated she will now hand it over to Attorney Doll.

Attorney Doll stated in each member's packet you will find certain sections of the rules and he thinks the rule that your attention should be drawn to is 3.7 subsection (c). He stated it simply says, "The petitioner and owner of record or legal representative, either an Attorney at Law or an Attorney in Fact must appear before the Board for the case to be considered." He stated this is the procedures and they are talking tonight on procedures for a special use and here are the facts that were presented to them. He stated Peabody Coal Company has a large track of ground, some of it they own outright, some of the land they own the coal rights, but a portion of the land they have neither and have in fact leased the land rights many years ago. He stated people have died and willed their rights to the ground to others and passed them on to their heirs. He stated so as it comes now Warrick County has a special use requirement to conduct mining activities. He stated they used to not have such a thing, but in order for Peabody Coal to come in to get a special use permit approval for mining of this ground, they have to have the owners of the land sign the application. He stated Peabody is telling them that this is impossible in some cases. He stated many of the owners don't live here anymore and some of the owners may not be willing to sign even though their ancestors leased the coal ground for mining purposes. He stated Peabody Coal has asked them to consider amending 3.7 (c) and change this to create a process where instead of having the owners sign the application, they create an alternative, either the owner signs the application or the applicant that has a lawful right to use the ground in some capacity will provide notice to the owners that they are filing this application. He stated that the application will be heard on this day and the purpose of the application, in this case to conduct mining activities, and that the owners will have certain rights to be present, to be heard, to ask questions, to receive answers and facts, if they choose to do so. He stated what this boils down to is competing dual process rights.

Attorney Doll stated hypothetically he is a land owner; the application is going to affect his land in some capacity. He stated he may have leased it or his grandfather may have leased it for coal mining purposes decades ago, but he is the current owner now and he has a right, by law, the constitution, to participate in this process in giving them the special use to mine the coal on his land.

Attorney Doll stated hypothetically he is Peabody Coal Company and they have paid money for these leases, lots in some cases, may have been 10 years ago or 50 years ago, but they bought the right to mine the coal. He stated now they want to mine the coal, but one land owner says I'll never sign your piece of paper; there is no exception for that in the Boards rules. He stated the Board is discriminating against their ability to exercise their due process, rights to mine property they have paid considerations for. He stated the question is can they find a balance that allows both sets of rights to come into play.

Attorney Doll stated this application is for 1000 acres, the entire mine is 8000 acres, this is not a small problem. He stated there are 15 parcels in the first application that are owned by third parties. He stated some of those are owned by multiple people, so the question gets to be how do they give the owners their constitutionally protected rights and also give the coal right owners their constitutionally protected rights.

Attorney Doll stated he has been in contact with the attorney for Peabody. He stated he will start by telling you there is no perfect answer; he does not think the Warrick County Area Plan Commission staff should not have the responsibility of figuring out who the owners are in a 1000 acre application for a coal mine.

Mr. Winge asked how does the coal mine get the money to the owners.

Attorney Doll stated it may go into a trust, who knows where, it is hard to say. He stated sometimes the owners of the property and the royalty recipients are not necessarily one in the same. He stated sometimes the coal interests are held in LLC or in Corporations or in Family Trust that were created by the grandfather years ago to divide up the money among the kids. He asked what if they can ascertain who all the owners are, but one will not sign and he says no, how do they fix that. He asked if they cut out his piece of dirt and sue him. He stated is that the right thing for this Board to do or as long as he is given his due process notification and rights to appear and be heard where he can stand up here and say don't approve and here is why. He stated otherwise you can have one single land holder frustrating the entire application. He stated or one single land holder frustrating 15 other land owners that want it to be mined. He stated there is no perfect solution. He stated the solution that they came to was that in most cases if they decide to do this and it is strictly this Boards decision as long as they comply with the statutory requirements.

Attorney Doll stated you could make part of the application that they submit a certified listing of all the owners in writing. He stated that puts the burden on the applicant. He stated so not only will they be giving a list of adjoining property owner, but the owners as well. He stated the owners will receive what he is going to call a, "Super Notice," which is more than a notice to adjoining land owners, because it would tell them that their rights are being affected. He stated that they have a right to be heard and a right to be present and to speak on that right. He stated they could if they want to, the applicant could waive that right and have everyone sign the application the way the current rule applies, so it gives them an option. He stated on the night of the hearing they would have all the returned cards from all the land owners or proof that all of the certified mail went and they have talked about moving that a little earlier because their return cards don't give them enough time to verify even the adjoining land owners are getting notice of this meeting. He stated they have a 10 day rule.

Mrs. Rector stated the post office holds them 15 days.

Attorney Doll stated so they really need to move their date on the certified mail to earlier. He stated that might delay some people's application.

Mrs. Rector stated they could just make the filing deadlines earlier.

Attorney Doll stated in summation they would have to amend rule 3.7 (c) to allow not only that the owners of records sign and appear instead that they would have the option to be noticed and verification of notice by certified mail to be a substitution for that.

Mrs. Rector asked if she has a farmhouse that her great, great grandpa bought who gave it to great grandpa, and it finally ends up as hers and she has no idea that Peabody Coal Company owns any mining rights to anything.

Mr. Winge stated let me stop you right there. He stated from what he has dealt with in real estate, if there are mineral rights or whatever, when you get that piece of property you are notified.

Mrs. Rector stated it says subject to.

Attorney Doll stated it doesn't have to be. He stated grandpa could have sold the mineral rights out to Peabody years and years ago and just not put it on the deed. He stated it does not mean it is less gone.

Mrs. Rector stated right, so she has this property and has no idea. She stated she just spent \$100,000 fixing up her house and then she comes and stands in front of the Board crying and says, "They sent me a letter and I have no idea and I don't want them to mine my property." She then asked what legal rights do they have to approve, to make the decision where it is a

legal document or not, that they have the rights and how can we approve something an owner doesn't want.

Attorney Doll stated none. He stated they will have to go to court and fight it out with Peabody, they do not determine private rights. He stated that is a civil matter. He stated he would turn to the objectives under rules 6 for special uses and it says, "Certain uses are necessary to the life and economic health of the community, but have characteristics of operation that do not readily permit classification in the usual residential, commercial, or industrial districts." He stated the Board would need to decide if coal mining is appropriate in that area of the County based upon the objectives of Rule 6. He stated that is what they have to do if they have all the owners present. He stated the fact that she is here either by notice or just shows up does not change their duty at all. He stated the questions is how do we let her know her rights to be here.

Mr. Willis stated she does not have to be here, but she can be here if she so wants to as long as she is notified that there is going to be a hearing tonight.

Mrs. Rector stated she understands that and that is fine with her, but she just wants to know if then it would go through the appeals process in court against their decision.

Mr. Winge stated he could sympathies with you on that because he has friends that have run into the same problem, but here is the thing there has never been a perfect system on anything. He stated somebody made an agreement earlier, whoever the parents or grandparents were that agreed to this. He stated this is job creation and for one person to hold that up, not that he does not think individual rights of property is very important, but the initial agreement that people set up with them, is binding. He stated some of that responsibility should fall upon the parents or grandparents' telling the people as it is passed down.

Mrs. Rector stated she is just asking the question to get it out there for the board.

Mr. Willis stated or the abstractor to pass that along.

Mrs. Rector stated her other thing is how do they make an exception to coal mine special uses and not any others.

Attorney Doll stated that is the next question. He asked do they create a rule just applicable to multiple party applications where you have six or more owners.

Mr. Winge stated he has another question.

Mr. Willis stated let him finish.

Attorney Doll asked or do they change the rule for everybody. He stated they saw it tonight; he had a power of attorney and had he not had one the meeting would have been over. He stated the owner was not here.

Mrs. Rector stated the staff tells them.

Attorney Doll stated he knows they tell them, they tell them a lot of things and they just don't listen. He asked the point is if they change the rule how far do they want to change it. He stated the Ordinance states the owner has to be here or his or her lawyer, or a power of attorney. He asked do they change the rule to substitute a possible fourth option, notification and do they change it for every special use or just for only multiple special use owners like six or more different owners. He stated then they trigger the option of doing the mail and his job is to keep the Board from being suited. He stated he wants to derive a system that is constitutionally appropriate, that provides everyone, owner of land and the company, their due process of law to be able to use property appropriately and complies with their ordinance. He stated if they

make a rule that applies to multiple owned properties, they probably stand a greater risk of being suited by someone, then if they make one rule applicable to everybody. He stated then they cannot say they are being arbitrary and capricious against one category of applicant and not another.

Mrs. Rector stated one other thing to consider is in the zoning ordinance under different special use categories they have certain criteria for them, they could consider putting it in there.

Mr. Mottley stated he can give you a list of about 25 people that has property that they have bought from Frank Jones and he maintained the oil and mineral rights on every piece of property. He stated he already made a killing off Peabody because they mined around him and didn't give him access to his property and he won that lawsuit, then he took and sold these properties and kept all the mineral rights and gas rights. He stated everybody that bought these 5 acre parcels, their deeds say they don't own any of the mineral rights underneath them. He stated now they want to strip mine, are they going to let them strip mine 25 people's homes that some of them might be \$400,000 value. He stated this is an issue that is going to be there.

Discussion was held about people that have done that in the past.

Mr. Winge asked if the mine was trying to tell us that they have never had a situation like this come up before in the past.

Attorney Doll stated Warrick County did not previously regulate mining.

Mr. Winge stated he was asking about any county, surely they have ran into this somewhere else.

Attorney Doll stated there is not a County that mines more than Warrick County in the State of Indiana.

Mr. Winge asked what about going to another state like West Virginia.

Attorney Doll stated West Virginia law would not be binding in Indiana. He stated Vigo County Ordinances would not be controlling for us in Warrick either, but Mrs. Rector and I had talked about finding other ordinances in other counties about other special uses not necessarily mining. He stated frankly he hasn't found any, but that doesn't mean they don't exist, it just means he hasn't found them yet. He stated he thinks if the Board is inclined to fix it, he thinks they also have to amend section 5 of the zoning code, because they could add a special section there to deal just with the procedures for mine sites for special uses to mine with multiple owned property owners in a mine site. He stated by putting that in there it would not affect the lady that wants to put the beauty parlor in the house, it just affects big projects like the mine sites. He stated there may be one or two hold outs for whatever personal reason they may have in it.

Mrs. Rector stated since this is in the Comprehensive Zoning Ordinance the only thing this Board can do is made a recommendation to the Area Plan Commission to make an ordinance to make the change.

Attorney Doll stated it then goes to the County Commissioner for adoption. He stated this draws out the time period for Peabody, but that is the way it is. He stated he wondered if there was a way to fix this temporarily and frankly he doesn't want to fix it temporarily, because if it is an 8,000 acre application pending, fixing one time temporarily isn't going to fix the problem, they should just fix the problem so business knows what their options, right, and responsibilities are and they go from there.



Mr. Winge stated they should not be treated differently than anyone else and it should be a permanent fix.

Attorney Doll stated if he has anything to do with righting the ordinance they are going to do overkill on the notice and make sure the property owners know all their rights and that they should be present if they intend to exercise those rights.

Mr. Winge asked if they could have a hold harmless or bond, something like that in case there would be an issue, has that even been considered.

Attorney Doll stated where they have a hold harmless clause is where they approve a variance or a special use, typically a variance, and they allow a driveway to be put in, in an unusual way or some such way that fire, police, or ambulance may not be able to get to the house. He stated then they say that the owner has to give the County and the Area Plan Commission a Hold Harmless in case someone is negatively harmed because of that and they want to suite somebody, because grandma died because the ambulance could not get back there. He stated the only other thing you could do is conditionally approve the special use that says Peabody Coal would have to hold Warrick County harmless if there is any litigation over the propriety of granting the special use application.

Mr. Winge stated he thinks they should definitely do that.

Attorney Doll stated that would be on a case by case basis and the Board would have to make that motion when they move to approve the application. He stated this is touchy and you are talking about two sides that both have property rights and interest. He then asked if the Board had questions for him.

Mr. Mottley stated they had a special use at ALCOA on a landfill and he filed suit. He stated for one, they had not identified the cemetery; they still have the cemetery in the landfill. He stated then there were two of the three County Commissioner that worked at ALCOA, one had recently retired, but still drawing a pension, so he thinks it is going to open a can of worms. He stated he thinks these people will take them to court and say that they have \$480,000 in their house, not including their out building, the concrete driveway, and they pay X amount of dollars on taxes to Warrick County and they want to strip mine their house. He stated if they are just going to mine underneath, that should not be that much of an issue, because just about everyone has underground mining under their house. He stated he has already looked at the permit on all 8,000 acres. He stated they have had two different groups that have walked the streams and things with Peabody and spent thousands of dollars on experts to make sure the drainage and stuff is going to remain the same.

Mr. Willis asked if that was germane to their conversation right now.

Mr. Mottley stated his point is that they got money to spend on this other stuff; they should be able to spend it on notifying these people.

Attorney Doll stated they don't have any objection to notifying; their augment is that they can't compel somebody to appear. He stated right now if they walked in here and had 45 owners they would all have to be present, or have an attorney present for you or a power of attorney to let someone speak on your behave. He stated if there were 44 of them here but not the 45<sup>th</sup> they could not proceed with the application with the special use.

Mr. Willis asked if they did not have something like that with the Wasson's about 6 months ago.

Mrs. Rector stated yes.

Attorney Doll stated this problem will ultimately go away with the new leases. He stated the new leases give them power of attorney for the coal companies to get government permits for purposes of mining.

Mrs. Rector asked when they go to get their permit from DNR what do they do with the land owners there.

Attorney Doll stated he does not think the land owner has to sign. He then asked Mr. Mottley if he agreed.

Mr. Mottley stated all they have to do is notify adjacent property owners because they already have a document signed that they have the rights to that coal.

Mr. Winge stated he looks at this thing two ways, the first is if they bought the right to get it. He stated seconded they are the ones in the community trying to prosper the community and themselves.

Attorney Doll stated it may be that the land owners are not saying no to coal; they may say I have drainage issues that they are concerned about. He stated he cannot sit here and envision every conservable objection and who should win it or lose it as they sit here, but he is certain that everyone has a right to their day in court. He stated they have a right to be present and the coal company has their rights as well just not ownership of the property. He stated they have to come up with a way that every owner gets notification of their rights to be heard, but not a condition that they have to be present, and the other questions is do you do it for only coal or for everybody.

Mr. Winge stated if it is put in there is should be across the board for everyone.

Attorney Doll stated so this guy this evening, you believe, would not need the power of attorney, he could represent as the applicant.

Mr. Winge stated he thinks everything should be fair to all, otherwise you are discriminating.

Mrs. Rector asked if they could put in there if they get suited because they approve a special use and someone didn't want it, that the mines have to pay the attorney fees.

Attorney Doll stated that is what Mr. Winge was saying. He stated yeah it could be a condition of a special use approval.

Mr. Mottley stated one of our Board Members is one of the land owners in the 8,000 acres.

Mrs. Rector stated she would not be able to vote on it because she has a financial interest in it.

Attorney Doll stated Mrs. Rector is correct that the correct procedures would be two things. He stated number one would be to make a recommendation to the Area Plan Commission if they think they should change the special use section of the County Ordinance Section 5 to establish a different procedure for the owners to participate in a special use application. He stated and is it for everybody or only for large project with multiple land owners and they need to say what multiple land owners mean. He stated he would not amend the rules until they know the ordinance is changed.

Mr. Winge asked the Board what kind of scenario can anyone think of that would cause if they did do that across the board.

Mrs. Rector stated she does not know the legality of leasing something from somebody. She stated if you lease a building from someone and you tell them it is going to be to sell bibles and

then you start selling adult items, and the owner goes hey I don't want him doing this and the guy says I have a lease, who has the right. She asked do they have the right to approve a use with someone with a lease over owning it.

Mr. Dayvolt stated he does not think it is about them giving them a right, he thinks it is a question of yes the land can be used for that. He stated they are not saying they have to do that, but yes the land can be used for that. He asked Attorney Doll what is it exactly that the Board is giving the okay to do on this 8,000 acres.

Attorney Doll stated to mine for mineral extraction, storage, processing, and/or gas productions.

Mr. Dayvolt asked then is it the owner that is going to do this.

Attorney Doll stated not always, it will be the owner in some of these parcels of ground that make up a 1,000 acres Peabody actually owns the ground, in some of them Peabody owns the vein of coal under the ground, and in some of them Peabody owns a lease to mine the coal that they have been paying an advanced royalty for.

Mr. Dayvolt stated he understands that, but what he is asking is this Board giving its okay to. He asked are they giving them the okay to go in and mine that area that is conducive to mining or are we saying go mine it.

Mr. Willis stated what they are doing is giving them permission to start their mining application.

Attorney Doll stated Warrick County has identified 28 activities that are not ordinary activities, that are a little unique or different or unusual, that require us to review each of these activities to say that it fits where they propose to do it.

Mr. Dayvolt stated okay, it fits.

Attorney Doll stated yes.

Mr. Winge asked why don't they just take it out.

Mr. Dayvolt stated do you understand what he is saying, "It fits."

Mrs. Rector stated she votes to do that, she wants to eliminate it period.

Mr. Dayvolt stated basically what they are doing is the same thing they did with the windmill. He stated it fits and the ordinance says you can do it. He then asked if the ordinance says you can mine in Warrick County, correct.

Attorney Doll stated the ordinance doesn't say you can't mine in Warrick County, therefore it is presumed you can.

Mr. Dayvolt stated okay, so whether it is damaging to the astatically value of the property next door or whether it is a safety hazard or whatever, it's okay. He stated that is what he is saying with the windmill, they didn't say the windmill was safe, they didn't say it was going to take care of the depreciation or appreciation of their property, what they said was its okay. He stated it is in our zoning ordinance and it is okay. He stated none of these 45 out in the air owners would come in here in single file and say they want a mining permit, even though they have sold all their rights to Peabody. He asked Peabody owns the right to mine that coal, correct.

Attorney Doll stated yes, one way or another.

Mr. Dayvolt stated all the Board is saying is that mining is in line with what the County describes as what that property can be used for or where mining can be done. He stated the other part of it with the owner and Peabody that is between the two of them. He stated that is just like that Hamby case that is between the two of them. He stated they were drug into it but when it all boiled down to it the petitioner is not the owner of the ground but owns the mineral rights to mine the ground and all the Board is saying is that yes you can mine the ground if you can get the owner to do it.

Attorney Doll stated presently that is exactly what they are saying. He stated if they can get the owners to sign or show up at a hearing, then you can mine coal.

Mr. Dayvolt stated the petitioner owns the mineral rights to the minerals.

Attorney Doll stated yes he does.

Mr. Dayvolt stated okay, the property owner owns the rights to the ground.

Attorney Doll stated yes they do.

Mr. Dayvolt asked and whoever, grandpa, uncle, whoever signed over those rights to Peabody and they have a document stating that those rights where signed over, correct.

Attorney Doll stated yes.

Mr. Dayvolt stated then the petitioner would be Peabody, who owns the mineral rights, and the Board is going to say Peabody this is in line with Warrick County in that area to mine that ground. He stated whether they can mine it or not is between them and the owner, which is not up to the Board.

Attorney Doll stated currently mining is not a permitted use as a designated use in any single zoning category in the County. He stated so if you repeal then he does not have a dog in this hunt. He stated if they repeal special use 13 and don't add mineral extraction as a permitted use anywhere else in the zoning code, it isn't happening in Warrick County anymore.

Mrs. Rector stated what they had before 2005 the Zoning Ordinance exempted agricultural uses and mineral extractions, so they could do it anywhere.

Attorney Doll stated that is not the way it is written now.

Mr. Mottley stated one of the reasons he was told why it was exempted is because they were having fly by night companies coming in and starting to mine, then leaving a mess like Mr. Cornell had to go back on the bond people because and so one of the ways of making sure that things were done a little bit better in the County, that is what they thought it would do and make these small coal companies come to us and people could have an objection would have their objection and just like now they are putting conditions like the lighting and mud.

Mr. Winge stated like washing the trucks, it is helping with things like that.

Mr. Dayvolt stated he understands that part of it, but that should be the County Highway washing the mud off the road; they should be the ones taking care of that not the Board of Zoning Appeals.

Mr. Winge stated they don't ever have money to do anything, you should know that

Mr. Dayvolt stated he knows everybody cries about that. He stated they get \$50 and they are going to stay here for 2 hours. He then stated what he is saying is the burden of proof should not be on them.

Mrs. Rector asked what he is saying is on page 32 where they look at it and they make the determination is the specific site appropriate, etc., all the findings that you read off. She then asked if it meets those findings and they have the rights to the minerals.

Mr. Dayvolt stated then they should be able to mine.

Mrs. Rector asked what about the owner.

Mr. Dayvolt stated he thinks all the owners need to be notified, don't get me wrong there.

Mrs. Rector asked if there should be a special notice for mining or should it be for everyone.

Mr. Dayvolt stated he would think for the mines, because the burden of who is going to be able to mine and mine what, is between that contractual agreement and Peabody.

Mr. Willis stated he thinks the mine company is dealing with a whole lot more property owners than anybody else would that would go out and rent and lease a piece of property and want to build a building or run a shop. He stated it is a whole lot easier to get one owner than it would to get multiply owners.

Attorney Doll stated if they don't control this, and he is not saying you have to, what if someone wants to be a coal mine adjacent to a school.

Mr. Mottley stated the State requires 300 feet.

Attorney Doll stated if they repeal the regulation of coal mining, the State of Indiana's regulation are one size fits all for all 92 counties. He stated they don't mine in all 92 counties because there is not coal in all 92 counties, but Mr. Mottley is right the rule is 300 feet. He stated they can put a coal mine within 300 feet of a school by state law and it is perfectly legal. He stated now if that same application came before this Board tonight he would think some of them would have a problem approving a coal mine within 300 feet of a school.

Mr. Dayvolt stated that can be handled under the statute Mrs. Rector just read. He stated it is not conducive to that property.

Attorney Doll stated exactly. He stated the simple way to fix this problem is to take mining out, but then they don't have the ability to say no, they don't want a coal mine within 300 feet of a school. He stated the question gets back to this, do they want to regulate locally and everything that goes with it.

Mr. Dayvolt stated here is what is hitting me in the brain, is the owner and Peabody.

Attorney Doll stated there is a third person at the table as well that they need to consider, the general public. He stated their job on this Board is not necessarily to protect the owner or Peabody, their job is to protect the general public.

Mr. Dayvolt stated he understands that.

Attorney Doll stated let me give you an example. He stated there are 28 regulated things that are so unusual and unique that nobody should have a right to building them in our County Ordinance without coming before them and demonstrating why they need to put it there. He

stated not only is it mining it is adult book stores, its strip clubs; it's all these things they don't want in our neighborhoods. He stated they have to regulate this somehow.

Mr. Dayvolt stated he thinks Attorney Doll has him wrong. He stated what he is talking about is the ownership between the owner of the property and the owner of the mineral rights.

Attorney Doll stated not our issue.

Mr. Dayvolt stated but they have made it their issue. He asked do they want to make it their issue.

Attorney Doll stated no.

Mr. Dayvolt stated because then it is more like a court house.

Attorney Doll stated they have no power, right now they have made it their issue because they say in our regulations that the petitioner and owner of record must appear before the Board. He stated they have injected ownership into the application here, the constitution requires them to give them their rights. He stated the constitution does not say they have to have the owner present. He stated he thinks they should lessen the role that this Board plays in any disputes between owners and applicants. He stated they can put that they don't have to be present but they do have to be adequately noticed.

Mr. Winge asked why can't we make them give us a certification that they have been noticed period.

Attorney Doll stated they should require a copy of the notification that is above and beyond the language of the adjoining land owner notice. He stated it needs to tell them they have the right to by present, a right to be heard, a right to deal with your issues, and they will not adjudicate property disputes between the applicant and the owner, etc. He stated that way they know they have touched all the due process requirements. He stated now if they show up and say what about drainage, what about there being a school 300 feet away, then they address the issues; however if they stand up and say I don't want coal mining on my property under any way shape or form, then we say sorry we can't help you. He stated then you show them the rules and say we can't help you, that is a civil matter, go see Judge Meyer, some judge. He asked do we continue to regulate coal, and if so can we do it by mail to the owner vs. having the owner set in this room. He then asked if they allow coal mines to have the owner notified by mail are they going to do it for things other than coal.

Mr. Mottley stated he thinks if there are multiple property owners involved in anything from a dairy farm to a coal mine to a hospital, then they are going to have to provide that information to them.

Attorney Doll stated and they can use the option of certified mail.

Mr. Mottley stated yes.

Attorney Doll stated the Board needs to define multiple.

Mr. Mottley stated 5 or more.

Mr. Winge stated he has 4 property owners and he is going to holler discrimination.

Attorney Doll stated arbitrary capricious.

Mr. Winge stated this is where he is at on this, absolutely regulated, because number one to protect the general welfare of the general public. He stated if you don't regulate it, they have so much money that the average citizen can't do anything and they are just stuck.

Mrs. Rector stated she cannot think of any other situation where there is more than one owner. She stated normally it is one owner that owns the property or they don't care to come. She stated the mine is the only thing, because of the several acres and the several owners.

Mr. Winge stated let me throw you a hypothetical; there is a farmer that owns 2,000 acres of ground and he has ten kids and ten or twelve grandkids that is all split up in different ways and they have assigned the mineral rights have been sold to them. He stated the coal companies have gotten away from it and they could end up having 20 or 30 descendants and all the sudden they are stuck with the same problem, but they did it for a mine and not for them. He stated we are going to run into a situation no matter what they do.

Mr. Mottley stated he is on the Community Advisory Board at Alcoa and they have already been telling them about the Liberty Mine. He stated this is going to be a 55 year mine reserve and they are getting leases right now.

Mrs. Rector stated she would like to make a recommendation to the Board. She stated she would like for Attorney Doll to put together and change the procedure 3.7 (c) to what they had previously talked about and put a notice together. She stated and then they would have to change the Comprehensive Zoning Ordinance from 10 days prior to 21 days. She stated the post office said they hold the letter for 15 days and then it takes another 5 days to get it back to you. She stated if they don't get that green card back from that owner, she does not think they should hear it.

Discussion was held on the white pay receipts.

Attorney Doll asked if this was for coal mines only or for everybody.

Mrs. Rector stated she thinks for everybody.

Attorney Doll stated he thinks that should be for those parcels that have more than one land owner. He stated hypothetically he owns a piece of property and he leases it to Mr. Dayvolt. He stated Mr. Dayvolt decides he is going to put in an adult book store in, so he files an application and he is not going to have him at the meeting because he is going to be standing up and saying no you can't let him put in an adult bookstore in his building, but he did not have it in his lease. He stated it should have been in his lease and excluded certain uses, but he didn't. He stated so he does not have a legal reason to stop Mr. Dayvolt from putting in an adult bookstore in his building, so he is going to try and prevent the Board from allowing him. He stated so Mr. Dayvolt has mailed him a notification and complied with the rules and maybe he will be present and maybe he won't, if it really matters he will be here. He stated he thinks it should be for multiple owners, more than one. He stated that way if there is just one owner they have to be present, if there are two or more they may be notified of their rights to be present.

Mrs. Rector asked what about husband and wife that is on one deed.

Attorney Doll stated for all other purposes under State law husband and wife are one owner. He stated husband by himself has no rights, wife by herself has no rights, but the couples have all the rights and if one of the couple dies automatically the remaining member of the couple owns it all. He then stated under the multiply owners in parentheses we would put husband and wife count as one parentheses, to clear that up for the staff. He then asked if they wanted to see this at the next meeting, do they want somebody to make a motion and approve it in form tonight knowing that he is going to follow what they have told him what to do, do they want to physically hold it in your hands and read it yourself before they vote on it.

Mr. Winge made a motion to approve it in concept for Attorney Doll to send to the Area Plan Commission to make a recommendation for the change of the ordinance to the County Commissioners.

Discussion was held on procedures.

The motion was seconded by Don Mottley and unanimously carried.

Being no other business the meeting adjourned at 7:30 pm.

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Larry Willis, Chairman

ATTEST:

The undersigned Secretary of the Warrick County Area of Zoning Appeals does hereby certify the above and foregoing is a full and complete record of the Minutes of said Board at their monthly meeting held October 25, 2010.

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Sherri Rector, Executive Director & Secretary